Malayan Banking Bhd v Pengarah Tanah dan Galian Negeri Selangor

HIGH COURT (SHAH ALAM) — SUIT NO 21NCVC-45–07 OF 2013
GUNALAN MUNIANDY JC
19 SEPTEMBER 2016

Land Law — Acquisition of land — Acquisition by government — Borrower charged land in favour of plaintiff — Borrower default in payment — Plaintiff commenced foreclosure proceedings — Plaintiff found that land had been progressively acquired by government even before borrower bought land — Plaintiff sued state authority for negligent and/or breach of statutory duty for failure to endorse memorial of acquisition on title — Whether defendant negligent or breached its statutory duty — Government Proceedings Act 1956 ss 5 & 6 — Land Acquisition Act 1960 ss 23, 25, 26 & 27 — National Land Code ss 12 & 101

The present action revolved around the transfer of a land located in Ulu Langat Selangor ('the said land') from Weng May Sdn Bhd to one Lukman bin Hassan and subsequently from Lukman to one Ng Ann Seng ('the borrower'). The said land was then charged in favour of the plaintiff by the borrower for a loan facility amounting to RM1.5m. On default of payment by the borrower, the plaintiff commenced foreclosure proceedings in which the said land was auctioned off to one Ivory Ascent Sdn Bhd. Problem arose when the plaintiff found that the said land had been progressively acquired pursuant to Form Ks which were issued in years 1985, 1997 and 1998 by the government by even before the land was acquired by Lukman bin Hassan. Consequently, the plaintiff brought the present action against the defendant for negligent and/or breach of statutory duty and claimed for damages. The issues for consideration were: (a) whether the land administrator had breached his statutory duties under s 23 of the Land Acquisition Act 1960 ('the Act') for failing to make memorial of the acquisition of the said land; (b) whether the proper registering authority negligently endorsed in the register document of title ('RDT') the increment of quit rent and non-payment of quit rent when the said land had been acquired; (c) whether the land administrator was negligent for failing to cancel the issue document of title ('IDT') which had been disposed of pursuant to s 27 of the Act once it had been returned to the land administrator; (d) whether the defendant was negligent in executing the transfer of the said land; (e) whether the land administrator was negligent in issuing new document of title respectively to Lukman bin Hassan and to Ng Ann Seng; and (f) whether the defendant was liable to the plaintiff to pay damages for losses suffered.

Held, allowing the plaintiff's claim with costs of RM25,000:

(1) The defendant's stand that the procedure prescribed in s 23 of the Act was merely a formality the non-compliance of which did not amount to a breach of statutory duty was misconceived. The court in the case of *Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor* [2015] 2 MLJ 126 held that the requirement for endorsement of the memorial was a formality and the omission to make the endorsement did not invalidate the acquisition process. However, in the present case, the plaintiff was not seeking for an order to invalidate the said acquisition but to hold the defendant liable for negligence and/or breach of statutory duty. Based on the evidence, the defendant had committed the tort of negligence and/or breach of statutory duty by failing to endorse the memorial of acquisition on the title (see paras 11 & 25).

(2) The defendant had undeniably breached the provisions of ss 25 and 26 of the Act and failed to abide by the procedures laid down therein and thereby breached its statutory duties and obligations as alleged. There was no revision of rent, resurvey and recalculation of rent done as required by s 25 of the Act nor was a title in continuation issued to the proprietor for the remaining portion in compliance with s 26 of the Act (see paras 12–13 & 26).

(3) Despite the entire land having already been acquired, the IDT, after the land was registered in the name of Ng Ann Seng as proprietor and charged to the plaintiff as charge, carried the endorsement that the quit rent payable had been amended pursuant to s 101 of the National Land Code ('the Code'). This was indisputably an act of negligence on the defendant's part as quit rent was no longer chargeable upon the complete acquisition of the subject land. Further, the transfer from Lukman to the borrower occurred as a result of the Form K not being endorsed as a memorial on the RDT. Had the registering authority complied with ss 25, 26 and 27 of the Act, the registrar would not have been able to issue the said title in continuation (see paras 16–18).

(4) The evidence that the defendant had no knowledge of the acquisition process had not been pleaded in the defendant's defence hence; the evidence violates the established principle that parties are strictly bound by their pleadings. Further, the entire acquisition process is under the purview of the state authority ('the SA') and pursuant to s 12 of the Code, both the land administrator and the defendant were appointees of the SA and acted as authorised representatives of the SA in executing the said process. It was therefore misconceived and baseless for the defendant to plead absence of knowledge of the acquisition process (see para 19).

(5) The relationship of the plaintiff with its customer would not exonerate the defendant if there was evidence of negligence and/or breach of statutory duty/obligations on its part. The creditworthiness of the borrower was strictly a matter between the plaintiff and the former and could not afford a good defence to the instant claim. Whether or not the plaintiff was negligent in evaluating the ability of the borrower to repay the loan was irrelevant to the plaintiff's pleaded case (see para 21).

(6) Sections 5 and 6 of the Government Proceedings Act 1956 could not provide any good defence to the defendant as this was clearly not an action to make the government vicariously liable for the negligence of its officer as evident from the pleadings (see paras 19 & 27).

[Bahasa Malaysia summary

Tindakan ini berkisarkan pemindahan tanah yang terletak di Ulu Langat Selangor ('tanah tersebut') daripada Weng May Sdn Bhd kepada Lukman bin Hassan dan kemudian daripada Lukman kepada Ng Ann Seng ('peminjam'). Tanah tersebut kemudian digadai mengikut kemahuan plaintif oleh peminjam untuk kemudahan pinjaman berjumlah RM1.5 juta. Akibat kegagalan membayar oleh peminjam, plaintif telah memulakan tindakan melelong di mana tanah tersebut telah dilelong kepada Ivory Ascent Sdn Bhd. Masalah timbul apabila plaintif mendapati bahawa tanah tersebut diperoleh secara progresif berikutan Borang K yang dikeluarkan dalam tahun 1985, 1997 dan 1998 oleh kerajaan sebelum tanah tersebut diperoleh oleh Lukman bin Hassan. Berikutan itu, plaintif telah memulakan tindakan ini terhadap defendan kerana kecuaian dan/atau pelanggaran kewajipan statutori dan menuntut ganti rugi. Isu-isu untuk dipertimbangkan adalah: (a) sama ada pentadbir tanah telah melanggar kewajipan statutori di bawah s 23 Akta Pengambilan Semula Tanah 1960 ('Akta') kerana gagal membuat memorial berhubung pengambilan semula tanah tersebut; (b) sama ada pihak berkuasa pendaftaran yang sewajarnya telah cuai mengendorskan dalam daftar surat ikatan hakmilik ('DSIHM') kenaikan cukai tanah dan cukai tanah yang tidak perlu dibayar apabila tanah tersebut diambil semula; (c) sama ada pentadbir tanah cuai kerana gagal membatalkan keluaran surat ikatan hakmilik ('KSIHM') yang telah dilupuskan menurut s 27 Akta tersebut setelah ia dikembalikan kepada pentadbir tanah; (d) sama ada defendan cuai dalam melaksanakan pemindahan tanah tersebut; (e) sama ada pentadbir tanah cuai dalam mengeluarkan surat ikatan hakmilik baru masing-masing kepada Lukman bin Hassan dan kepada Ng Ann Seng; dan (f) sama ada defendan bertanggungjawab kepada plaintif untuk membayar ganti rugi bagi kerugian yang dialami.

Diputuskan, membenarkan tuntutan plaintif dengan kos RM25,000:

(1) Pendirian defendan bahawa prosedur yang dinyatakan dalam s 23 Akta tersebut hanya satu formaliti ketidakpatuhan yang tidak merupakan

pelanggaran kewajipan statutori yang telah disalah tanggap. Mahkamah dalam kes *Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor* [2015] 2 MLJ 126 memutuskan bahawa keperluan untuk pengindorsan memorial itu adalah satu formaliti dan peningglan untuk membuat pengindorsan itu tidak menjadikan proses pengambilan semula tidak sah. Walau bagaimanapun, dalam kes ini, plaintif tidak memohon satu perintah untuk membatalkan pengambilan semula tersebut tetapi untuk mengatakan defendan bertanggungjawab kerana kecuaian dan/atau pelanggaran kewajipan statutori. Berdasarkan keterangan, defendan telah melakukan tort kecuaian dan/atau pelanggaran kewajipan statutori kerana gagal untuk mengindorskan memorial berhubung pengambilan semula hakmilik tersebut (lihat perenggan 11 & 25).

(2) Defendan tidak dinafikan telah melanggar peruntukan-peruntukan ss 25 dan 26 Akta tersebut dan telah gagal mematuhi prosedur-prosedur yang dinyatakan dan oleh itu telah melanggar kewajipan statutori dan kewajipannya sepertimana dikatakan. Tiada semakan sewa, kajian semula dan pengiraan semula sewa telah dilakukan seperti yang dikehendaki oleh s 25 Akta tersebut mahu pun terdapat hakmilik sambungan yang dikeluarkan kepada pemilik untuk baki bahagian yang mematuhi s 26 Akta tersebut (lihat perenggan 12–13 & 26).

(3) Walaupun keseluruhan tanah telahpun diperoleh, KSIHM, selepas tanah itu didaftarkan atas nama Ng Ann Seng sebagai pemilik dan digadaikan kepada plaintif sebagai gadaian, membawa pengindorsan itu bahawa cukai tanah yang boleh dibayar telahpun dipinda menurut s 101 Kanun Tanah Negara ('Kanun'). Ini tidak dinafikan tindakan yang cuai di pihak defendan kerana cukai tanah tidak lagi boleh dikenakan setelah pengambilan semula tanah tersebut siap. Selanjutnya, pemindahan daripada Lukman kepada peminjam berlaku akibat daripada Borang K tidak diindorskan sebagai memorial ke atas DSIHM. Jika pihak berkuasa pendaftaran mematuhi ss 25, 26 dan 27 Akta tersebut, pendaftar tidak mungkin dapat mengeluarkan hakmilik sambungan tersebut (lihat perenggan 16–18).

(4) Keterangan bahawa defendan tiada pengetahuan tentang proses pengambilan semula tidak dipli dalam pembelaan defendan justeru; keterangan itu bertentangan dengan prinsip bahawa pihak-pihak terikat dengan pliding mereka. Selanjutnya, keseluruhan proses pengambilan semula itu di bawah kawal selia pihak berkuasa negeri ('PBN') dan menurut s 12 Kanun tersebut, kedua-dua pentadbir dan defendan merupakan orang yang dilantik PBK dalam melaksanakan proses tersebut. Oleh itu ia adalah salah tanggapan dan tidak berasas untuk defendan mempli tiada pengetahuan tentang proses pengambilan semula (lihat perenggan 19).

(5) Hubungan plaintif dengan pelanggannya tidak melepaskan defendan jika terdapat keterangan kecuaian dan/atau pelanggaran kewajipan statutori di pihaknya. Kebolehpercayaan peminjam adalah suatu perkara antara plaintif dan peminjam dan tidak memberikan pembelaan yang kukuh dalam tuntutan ini. Sama ada atau tidak plaintif cuai dalam menilai kemampunya peminjam membayar semula pinjaman adalah tidak relevan kepada kes yang dipli oleh plaintif (lihat perenggan 21).

(6) Seksyen 5 dan 6 Akta Prosiding Kerajaan 1956 tidak memperuntukkan apa-apa pembelaan yang kukuh kepada defendan kerana ini jelas bukan tindakan untuk membuat kerajaan bertanggungjawab secara vikarius kerana kecuaian pegawainya sepertimana terbukti daripada pliding (lihat perenggan 19 & 27).]

Notes

For cases on acquisition by government, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2256–2258.

Cases referred to

Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor [2015] 2 MLJ 126; [2014] 7 CLJ 882, CA (refd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)

Legislation referred to

Government Proceedings Act 1956 ss 5, 6

Land Acquisition Act 1960 ss 23, 25, 26, 27

National Land Code ss 5, 12, 16, 22, 86(b), 89, 101, 175A, 292, Form K

Chong Phowy (Kamaruzaman Arif, Amran & Chong) for the plaintiff.

Mariah bt Omar (State Legal Advisor, Selangor State Legal Office) for the respondent.

Gunalan Muniandy JC:

[1] This is an action brought by the plaintiff bank against the Selangor State Authority wherein the Director of Lands and Mines Selangor was named as the defendant by virtue of s 16 of the National Land Code ('the NLC') as this is a suit relating to land where liability is sought to be established against the state authority. A State Director is as defined under s 5 of the NLC.

A THE PLAINTIFF'S CASE

[2] The essence of the plaintiff's case pertinent to the instant claim is as expressed in the witness statement of PW1, an employee of the plaintiff designated as a specialist in the preventive and credit quality task force at business banking, as follows:

B

> Sometime in 2011, the Bank granted a loan of RM1,500,000.00 to one Ng Ann Seng, the Borrower, to assist him in purchasing a piece of land in Cheras from one Lukman bin Hassan. On completion of the security documentation which included a Facility Agreement dated 16/5/2011 and a Charge on the said land in favour of the Bank, the loan was fully disbursed. The Borrower then defaulted on the loan and foreclosure proceedings were then commenced. The land was then auctioned off to one Ivory Ascent Sdn. Bhd. who successfully bid for the said land at the price of RM2,300,000.00. However, the land, which ought to have been secured by the Charge in favour of the Bank, had, unbeknown to the Bank, been progressively acquired by the Government even before the land was acquired by the said Lukman bin Hassan. As a result of which, the Bank did not get the security it had bargained for. The Bank did not know of the acquisition because of the negligence and breach of statutory duty on the part of the land authority. In fact, there was nothing to alert the Bank that the land had already been acquired. Had the bank known or been alerted that the said land had already been acquired, the Bank would surely not have granted the loan. The Bank therefore had to refund the deposit of RM100,000.00 paid by the successful bidder and now seek to recover its losses from the Selangor State Government as it never got to recover the loan or any part of the loan from the Borrower.

C

D

E

F THE DEFENCE CASE

[3] In its defence, the defendant claimed that the instruments of transfer from Weng May Sdn Bhd to Lukman bin Hassan and from Lukman bin Hassan to Ng Ann Seng and the instrument of charge by Ng Ann Seng in favour of the plaintiff were registered after the defendant was satisfied that they were fit for registration and proceeded to register the dealings in good faith in the course of carrying out its statutory and administrative obligations under the NLC.

G

H

[4] DW1, the present Deputy Registrar of Titles in the Selangor Land and Mines Office, the only witness for the defendant, gave evidence as summarised in the plaintiff's submission as follows:

I

> The defendant had no knowledge at all concerning the acquisition of the said Land by the Government that had taken place.
>
> Agree that the Form K was issued by the SA and the SA should know about the acquisition.

[5] In its defence, the defendant further contended that the plaintiff had failed to name in its statement of claim ('SOC') the actual tortfeasor as required under ss 5 and 6 of the Government Proceedings Act 1956 ('the GPA'). A

[6] In opposing the plaintiff's claim the defendant also advanced the following grounds in its defence: B

(a) the failure of the plaintiff in recovering its loan was caused in the first place by the plaintiff's negligence in giving the loan to Ng Ann Seng;

(b) the plaintiff was negligent in not appointing a competent valuer to value the said land before approving the loan to Ng Ann Seng; and C

(c) the plaintiff had failed to appoint a firm of competent solicitors who had the knowledge and experience in handling the legal documentation for the loan to the plaintiff.

D

MATERIAL FACTS

[7] The admitted or undisputed facts as distilled from the pleadings and the agreed documents, both as to contents and authenticity, have been enumerated in the plaintiff's written submission as these: E

(1) On 30/6/2010 vide Presentation no: 68904/2010, the land registry registered a transfer in Form 14A of a land held under Geran 41302, Lot 40 Sek 5, Bandar Cheras, Daerah Ulu Langat Selangor ('the said Land') from Weng May Sdn. Bhd. to Lukman bin Hassan. (Pages 3-6). F

(2) On 26/5/2011 vide Presentation No. 50526/2011, the land registry registered another transfer in Form 14A of the said land from Lukman bin Hassan to Ng Ann Seng. (Pages 7-10).

(3) On 26/5/2011 vide Presentation No. 50527/2011, the land registry registered a charge in Form 16A of the said land by Ng Ann Seng in favour of the plaintiff. (Pages 11-14). G

(4) The said Land had been progressively acquired by the Government in 1980, 1996 and 1997.

(5) The following Form Ks were issued by the relevant authority in relation to the said Land:- H

(i) 8/2/1985 whereby notice was given that formal possession of 1.168 acres of the said land has been taken. See page 54.

(ii) 7/7/1997 whereby notice was given that formal possession of 0.7238 acre of the said Land has been taken. See page 55. I

(iii) 6/2/1998 whereby notice was given that formal possession of 0.9758 of the said Lad has been taken. See page 56.

(iv) With the issuance of the last Form K the entire said Land was acquired as at 6/2/1998.

ISSUES TO BE TRIED

(a) whether the land administrator had breached his statutory duties pursuant to s 23 of the Land Acquisition Act 1960 for failing to make a memorial of the acquisition of Land for Title No 41302, Lot 40, Section 5, Bandar Cheras, Daerah Ulu Langat, Selangor?

(b) whether the proper registering authority negligently endorsed in the register document of title the increment of quit rent and non-payment of quit rent when the land had been aquired by the state authority?

(c) whether the land administrator was negligent for failing to cancel the issue document of title which has been disposed of pursuant to s 27 of the Land Acquisition Act 1960 once it had been returned to the land administrator?

(d) whether the land administrator was negligent in executing the transfer of land from Weng May Sdn Bhd to Lukman bin Hassan and consequently from Lukman bin Hassan to Ng Ann Seng?

(e) whether the land administrator was negligent in issuing the new document of title respectively to Lukman bin Hassan and to Ng Ann Seng? and

(f) whether the defendant was liable to the plaintiff to pay damages for losses suffered and if it is in the affirmative, what is the amount of damages?

PARTICULARS OF THE DEFENDANT'S ALLEGED NEGLIGENCE AND BREACH OF STATUTORY DUTY

[8] These are to be found in para 8(i) to (v) of the amended statement of claim as follows:

(a) the Registrar of Land Titles has failed to make a memorial of the acquisition in the register document of title pursuant to s 23 of the Land Acquisition Act 1960, which constituted a breach of statutory duty;

(b) the registering authority had negligently endorsed on the title of the said land an increment of quit rent and non-payment of the quit rent, when in fact there should no longer be any quit rent payable since the said land had already been acquired by the government;

(c) given that the said land had already been acquired, the registrar failed to withdraw and dispose of the issue document of title ('IDT') pursuant to s 27 of the Land Acquisition Act 1960 despite the documents having been surrendered to the land registry office upon the transfer of the said

land from Weng May Sdn Bhd to Lukman bin Hassan in 2010 and subsequently to Ng Ann Seng in 2011;

(d) the registrar allowed the registration of dealings of the said land by effecting the transfer of the said land from Weng May Sdn Bhd to Lukman bin Hassan and subsequently from Lukman bin Hassan to Ng Ann Seng, where in law the instruments of dealings effecting the transfer and charge were unfit for registration pursuant to s 292 of the NLC; and

(e) the registrar had negligently issued a fresh title to the said land to each of the parties concerned following the registration of transfer of the said land.

ANALYSIS AND FINDINGS

[9] The parties were on common ground as to the legal effect of the issuance of the Form Ks before the three subsequent dealings on the subject land. It is beyond dispute that the issuance of the Form Ks would render the three subsequent dealings null and void. This issue was deliberated upon by the Court of Appeal in *Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor* [2015] 2 MLJ 126; [2014] 7 CLJ 882 where Mah Weng Kwai JCA, in delivering the judgment of the court held:

> Upon the issuance of Borang K in 1974, the land had been vested in the state authority notwithstanding that there was an omission to endorse the memorial on the title, which was a requirement under s 23 of the Act. The requirement for an endorsement of the memorial was a formality and the omission to do so did not invalidate the acquisition process. As such, the purported transfer of the land in 1975 to the appellant's father and in 1992 to the appellant was void and ineffective. The acquisition process had ended in 1974.

[10] Applying the above ratio to the instant case, the most noteworthy fact with respect to the subject land is that the acquisition process was completed on 6 February 1998 following which there was no land left that could be dealt with. Hence, there was no question that the three subsequent dealings, namely, the transfer of the said land from Weng May Sdn Bhd to Lukman bin Hassan and from Lukman bin Hassan to Ng Ann Seng and the charge from Ng Ann Seng to the plaintiff are all void and ineffective based on the common law maxim 'nemo dat quod non habet' following the ration in the above Court of Appeal case.

[11] It is at the outset important to point out that the defendant did not dispute breach of or non-adherence to, the procedures laid down in s 23 of the Land Acquisition Act 1960 ('the LAA') as no memorial of the acquisition was made upon the register document of title ('RDT') or any other appropriate official record by the authority entrusted with registration. In this regard I agree

with the contention of the plaintiff that the defendant's stand that the procedure prescribed in s 23 is merely a formality the non-compliance of which does not amount to a breach of statutory duty that is actionable for damages suffered by the aggrieved party is misconceived. As correctly argued, the point to be noted is that while the Court of Appeal in *Ismail Lim bin Abdullah* held that the requirement for endorsement of the memorial is a formality. The omission to make the endorsement did not invalidate the acquisition process. In this case, the plaintiff is not seeking for an order to invalidate the said acquisition but to hold the defendant liable for negligence and/or breach of statutory duty.

[12] Further, the defendant had undeniably breached the provisions of ss 25 and 26 of the Land Acquisition Act 1960 ('the LAA') and failed to abide by the procedures laid down therein and thereby breached its statutory duties and obligations as alleged.

[13] These sections come into operation when any part of a lot is acquired, as in the present case but the procedures therein were blatantly not adhered to by the defendant. There was no revision of rent, resurvey and recalculation of rent done as required by s 25 nor was a title in continuation issued to the proprietor for the remaining portion in compliance with s 26.

[14] As for s 27 of the LAA it provides that:

> (1) Subject to ... and to the following subsections, the issue document of title delivered pursuant to section 24 shall be retained by the proper registering authority and disposed of in such a manner as may be provided by rules made under section 69.
>
> (2) Where an issue document of title delivered pursuant to section 24 relates to land which has not been acquired as well as to land which has been acquired, the proper registering authority shall make an endorsement indicating that it has been cancelled in so far as it relates to the land which has been acquired and shall then return it to the person who delivered it.

[15] The material documents before the court on the issue at hand are a copy of the issue document of title ('IDT') issued to Weng May Sdn Bhd ('WM') on 11 November 1998 as a title in continuation pursuant to s 175A of the NLC, a computer generated IDT issued to Ng Ann Seng, and a charge executed by him in favour of the plaintiff. A perusal of the title documents and the registered charge would clearly reflect a non-compliance with the mandatory procedure laid down in ss 25 and 26 of the LAA from the time the partial acquisition process began, culminating in the entire acquisition of the subject land.

[16] Despite the entire land having already been acquired, the IDT, after the land was registered in the name of Ng Ann Seng as proprietor and charged to the plaintiff as chargee carried the endorsement that the quit rent payable had been amended pursuant to s 101 of the NLC, wef 1 January 2006. This is indisputably an act of negligence on the defendant's part as quit rent was no longer chargeable upon the complete acquisition of the subject land, DW1, under cross-examination candidly admitted this fact.

[17] It was indisputable that the issuance of the title in continuation to WM on 11 November 1998 despite the complete acquisition enabled it to deal with subject land by transferring it to Lukman bin Hassan on 3 May 2010 who then came into possession of the title ('IDT'). This in turn enabled him to effect the transfer to Ng Ann Seng who was thereafter able to execute the charge in favour of the plaintiff on 26 May 2011. All these could not have been possible had the registering authority complied with the procedures prescribed in ss 25, 26 and 27 of the LAA. Had the registering authority acted in accordance with the law, the registrar would not have been able to issue the said title in continuation on 11 November 1998. This act of negligence indisputably resulted in the predicament that eventually befell the plaintiff as its security was then rendered non-existent and lost for good.

[18] When WM's solicitors applied for cancellation of the IDT on 10 August 1995 the Form K for the first partial acquisition of the subject land had already been issued some eight years ago but the prescribed procedures under ss 25, 26 and 27 of the LAA had not been followed. This omission or failure resulted in the wrongful issuance of the impugned title in continuation on 11 November 1998. To his credit, DW1 was forthright in admitting that when the land was transferred to Ng Ann Seng ('Ng'), the chargor, the title ought to have been in the hands of Lukman bin Hassan ('Lukman'). Further and importantly, that the transfer from Lukman to Ng occurred as a result of the Form K not being endorsed as a memorial on the RDT. As contended by the plaintiff, by virtue of s 86(b) of the NLC, the state authority guarantees the correctness of the information contained in the IDT since it is merely a copy of the RDT, the effect being that the plaintiff is in law entitled to rely on the conclusiveness of the information contained in the RDT which can be regarded as conclusive evidence of all the matters appearing therein s 89 of the NLC is considered to embody the 'curtain' and 'mirror' principles that persons dealing with the registered proprietor of the land can safely act on the information presented on the register and that it is not necessary to go behind the register in order to ascertain the validity of the information contained in it (see *Teo Keang Sood & Khaw Lake Tee, Land Law in Malaysia, Cases & Commentary*, (2nd Ed) at p 28).

[19] As regards DW1's evidence that the defendant had no knowledge of the present acquisition process, it is first important to note that the defendant has not made this plea in its defence and thus, the evidence violates the established principle that parties are strictly bound by their pleadings. It is trite law that evidence adduced on issues and matters not raised in the pleadings cannot be considered to adjudicate the claim. As admitted by DW1 himself, upon issuance of the Form K, the SA ought to be fully aware of the acquisition of the subject land. It is noteworthy that the entire acquisition process is under the purview of the SA and pursuant to s 12 of the NLC, both the land administrator and the defendant are appointees of the SA and act as authorised representatives of the SA in executing the said process. For the defendant to now plead absence of knowledge of the acquisition process is wholly misconceived and baseless. Coming now to an important defence raised by the defendant, namely, that the claim is wrong/bad in law as the plaintiff had failed to name the tortfeasor as required by ss 5 and 6 of the Government Proceedings Act 1956 ('the GPA'), in my view, the provisions of these sections cannot provide a good defence to the defendant in the present action. This is so as this action is not intended to render the government vicariously liable for the tortious acts or negligence of its officer and as such, the prescribed conditions for bringing an action of this kind would not apply. I concur with the contention of the plaintiff on this issue that ss 5 and 6 of the GPA can only be invoked as a defence if the plaintiff is seeking to make the Government vicariously liable for the tortious act of its officer in which event it would be insufficient to merely identify the officer without joining the officer as a party. My attention was drawn to the Federal Court case of *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663, where it was held as follows on the issue of the government's vicarious liability:

> In any claim in tort against the government, the government officer who was responsible for the alleged tortious act must be made a party and his liability must be established before the government could be made vicariously liable as principal (ss 5, 6 of the Government Proceedings Act 1956 ('the GP')). It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needed to be established. It was only upon a successful claim against the officer personally could a claim be made against the government. (para 16).

[20] Moreover, no responsible officer of the defendant can be held liable even if his identity is known and is brought as a co-defendant as in the absence of bad faith he would be conferred absolute immunity from any liability whatsoever (see s 22 of the NLC).

[21] As to the defence allegation that the plaintiff itself was in the first place negligent in granting the loan to Ng Ann Seng and thereby caused the failure to recover the loan, suffice to say that the relationship of the plaintiff with its customer would not exonerate the defendant if there is evidence of negligence

and/or breach of statutory duty/obligations on its part. The creditworthiness of the borrower is strictly a matter between the plaintiff and the former and cannot afford a good defence to the instant claim. Whether or not the plaintiff was negligent in evaluating the ability of the borrower to repay the loan was irrelevant to the plaintiff's pleaded case.

[22] In respect of the plaintiff's alleged negligence in appointing a competent valuer before approving the borrower's loan application, not an iota of evidence was led to prove this allegation, particularly that the plaintiff's valuer was negligent in conducting a thorough investigation of the subject land beyond just making a title search at the land registry. It is important to bear in mind that this was a normal valuation in respect of a loan application and not for the purposes of foreclosure proceedings where the market and forced sale values were of importance. Hence, there was no duty on the part of the lender's valuer to go beyond the title search and make enquiries from other authorities to determine the status of the land or to detect any acquisition process involving the land. In essence, there was no proof of negligence on the valuer's part in failing to detect the series of acquisitions carried out by the authorities which he would have if not for negligence and/or breach of statutory duties and/or obligations by the defendant as adverted to.

[23] Lastly, as to the allegation that the plaintiff had failed to appoint a competent firm of solicitors with sufficient expertise in handling its legal documentation, my attention was drawn to the fact that a third party notice ('TPN') had in this case been issued by the defendant against the said documentation solicitors on the same grounds as alleged in the defence. However, an application commenced by the said solicitors to set aside the TPN was successful wherein the TPN was set aside by this court with costs and further proceedings in relation to the TPN were struck out. No appeal was brought by the defendant against this order which, therefore, stands. Hence, the issue of negligence by the plaintiff's documentation solicitors is a non-issue by reason of res judicata.

[24] To conclude on the various defences raised by the defendant, I concur with the plaintiff's contention that based on the totality of the evidence adduced at the trial, the fact remains that there was really nothing to alert the plaintiff, the valuers and/or the loan documentation solicitors that the subject land had been acquired. This is self-evident from the fact that the plaintiff's charge was registered by the land registrar. DW1 himself conceded that apart from the entry of the Form K as a memorial in the RDT there was no other form of notification to the defendant of the acquisition. It follows, therefore, that there was no question at all of the plaintiff's valuers, and/or solicitors being incompetent for not knowing about the acquisition.

CONCLUSION

[25] Upon having evaluated the totality of the evidence adduced at the trial, I find that the plaintiff has proved its case as per its pleaded claim on a balance of probabilities that the defendant had, as the statutory body entrusted with powers in respect of land administration and registration of land titles and dealings on behalf of the state authority, committed the tort of negligence and/or breach of statutory duly by failing to endorse the memorial of acquisition on the title. This negligent omission had eventually caused the plaintiff to lose its security via the charge over the land in its favour and thereby caused losses and damages to the plaintiff as pleaded.

[26] The defendant has clearly breached the provisions of ss 25 and 26 of the Land Acquisition Act 1960 ('the LAA') and failed to abide by the procedures laid down therein and therefore, breached its statutory duties and obligations as alleged.

[27] Sections 5 and 6 of the GPA cannot provide any good defence to the defendant as this is clearly not an action to make the government vicariously liable for the negligence of its officer as evident from the pleadings.

[28] For the foregoing reasons, I allowed the plaintiff's claim and entered judgment for the plaintiff in the sum of *RM1,752,994.83* as at 30 April 2013 with interest of 4% pa from 30 April 2013 until judgment and 5%pa from the date of judgment until realisation and costs.

QUANTUM

[29] The quantum of the plaintiff's claim as pleaded was not disputed or challenged by the defendant at the trial. The judgment sum was arrived at as follows.

[30] Based on the unchallenged evidence of PW1 the plaintiff could not recover its loan of RM1.5m which it had released after receipt of the loan documentation solicitors' letter of advice.

[31] What the plaintiff foreclosed was an 'illusory' or non-existent security which it was unaware of but the land was sold to the successful bidder at RM2,300,000. If not for the omission or failure by the SA as pleaded, the plaintiff would have stood to recover from the proceeds the debt due from the borrower in the sum of more than RM1.5m as at 31 January 2012.

[32] As at 30 April 2013, the debt due amounted to *RM1,765,108.73*, based on the undisputed figure given by PW1 in his testimony as extracted from the

plaintiff bank's computer system. Having taken into account the auctioneer's fee of RM4,503 and the legal fee of RM13,383 which were unrebutted and deducting a sum of RM30,000 being the court deposit, the judgment sum as above was arrived at.

[33] Lastly, I assessed costs payable by the defendant to the plaintiff in the sum of RM25,000 having considered the nature and value of the claim, the issues arising for determination, the length of the trial and all other surrounding factors.

Plaintiff's claim allowed with costs of RM25,000.

Reported by Dzulqarnain Ab Fatar